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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,
v.
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, an unincorporated association, BEN OCHOA, GENERAL CHAIRMAN, E.R. SPEARS, GENERAL CHAIRMAN, PAUL S. SWANSON, GENERAL CHAIRMAN, and BRUCE G. GLOVER, GENERAL CHAIRMAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

When a union strikes over a dispute which is later determined by a court to be "minor" in violation of § 2 First of the Ralway Labor Act ("RLA"), 45 USC § 152 First, is the appropriate remedy for judicial enforcement of § 2 First limited to equitable injunctive relief restoring the status quo and channeling the parties to resolution of the dispute under the RLA procedures.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Brotherhood of Maintenance of Way Employes, Ben Ochoa, E. R. Spears, Paul S. Swanson, and Bruce G. Glover (hereinafter referred to collectively as "Respondents" or "BMWE") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86 (5th Cir.), *reh'g en banc denied*, 968 F.2d 18 (5th Cir. 1992). In support of denial of the writ Respondents would respectfully show as follows:

JURISDICTION

Jurisdiction has been invoked by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The question presented involves the provisions of Sections 2 First, Sixth, and Seventh of the Railway Labor Act ("RLA"), 45 U.S.C., Section 152 *et seq.*, which are set forth in the Appendix. Section 2 First is set forth below:

> First. Duty of carriers and employees to settle disputes
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any other carrier growing out of any dispute between the carrier and the employees thereof.

STATEMENT OF THE CASE

Petitioner's statement of the case contains factual assertions which are beyond the record or are misstate-

ments of the facts established in the record. Therefore, heeding Supreme Court Rule 15.1., Respondents submit the following counter-statement of the case.

A. Course of Proceedings and Disposition Below

On June 26, 1990 Petitioner Burlington Northern ("BN") filed a "Verified Complaint for Injunctive Relief" [1] seeking to enjoin a planned 24 hour strike by the BMWE against a selected portion of BN's property. The strike was called over what BMWE reasonably believed to be a "major dispute" between the parties which would give it the right to resort to self-help.[2]

On that same date, the District Court entered a Temporary Restraining Order ("TRO") (R.121-23)[3] restraining the BMWE from engaging in any strike activity. Upon notice of the TRO, BMWE complied and refrained from any further strike or self-help action. It is undisputed that BMWE has fully complied with all of the orders of the District Court. The strike injunction was continued by agreement through hearing on BN's Motion for Preliminary Injunction. (R.124, 125-26).

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[1] As indicated by the heading, Petitioner's complaint, which was never amended, sought injunctive relief under the authority of *Br. R.R. Trainmen v. Chicago River and Indiana R.R.*, 553 U.S. 30 (1957) against a strike by BMWE, and nowhere contains any allegations with respect to the damages it now seeks to recover. The sole mention in the complaint of any monetary recovery is the passing reference in the prayer for a permanent strike injunction that BN also seeks certain unspecified "damages incurred."

[2] *See, e.g., Shoreline Railroad v. UTU*, 369 U.S. 142, 154-155 (1969); *Butte, Anaconda & Pacific Railroad Co. v. BLE*, 268 F.2d 54 (9th Cir.), *cert. denied*, 361 U.S. 864 (1959). As this Court stated in *Shoreline, supra*, 396 U.S. at 154-155 "it could hardly be expected that the union would sit idly by as the railroad rushed to accomplish the very result the union was seeking to prohibit. . . . If the railroad is free to resort to self-help [by making a unilateral change], the union cannot be expected to hold back its own economic weapons, including strike."

[3] Citation to the Record on Appeal will be by the notation "R." followed by the relevant pages of the Record.

At the close of the Preliminary Injunction hearing on August 20, 1990, the District Court found a substantial likelihood that the dispute was "minor" (and not "major" as contended by BMWE) and entered a preliminary injunction against any further strike activity pending trial on the merits. (R.295-98).

On January 9, 1991, BN moved for Summary Judgment seeking a permanent strike injunction and the recovery of monetary damages in the guise of a claim for equitable restitution. (R.393-400; R.401-27). By response filed February 6, 1991, BMWE opposed the entry of a permanent strike injunction asserting that the dispute was a "major" dispute arising from BN's violation of Section 2 SEVENTH of the Railway Labor Act ("RLA"), 45 U.S.C. § 152 SEVENTH, over which BMWE had a right to engage in self-help (R.469-88).

Simultaneously BMWE moved pursuant to Rule 12 (b)(6), Federal Rules of Civil Procedure ("F.R.C.P."), to dismiss BN's claim for monetary relief, which was then couched by BN only as a claim for equitable restitution, not the compensatory damages which it apparently now seeks. (R.435-37; R.438-68).

On February 14, 1991, the District Court granted BN's Motion for Summary Judgment with respect to a permanent strike injunction, but denied BN's request for monetary relief, finding that BN "has failed to show that it is entitled to monetary relief as a matter of law." (R.874-75). On that same date, the District Court entered a separate order finding the dispute to be "minor" and not "major," and permanently enjoined BMWE and certain of the individual defendants from engaging in any further strike activity, which order has been fully complied with. (R.872 ff.). On February 27, 1991, BMWE moved to amend the breadth of the Court's permanent strike injunction to limit its scope to the specific dispute at issue in this case. (R.876-85).

On March 7, 1991, the court entered an Order granting BMWE's Rule 12(b)(6) motion to dismiss BN's

claim for monetary relief (R.913-14), and entered a separate Final Judgment (R.916) on that same date, which held that BN "have no monetary recovery from defendants." (R.916).

On March 20, 1991, the District Court entered an order granting BMWE's Motion to alter the breadth of the strike injunction (R.939-40). In accordance therewith, on March 21, 1991 the District Court amended its February 14, 1991 permanent strike injunction limiting its scope to the dispute at issue in this case. (R.941).

Notice of Appeal from the District Court's March 7, 1991 Rule 12(b)(6) dismissal of BN's request for monetary relief was filed on April 4, 1991. BN's suggestion for hearing *en banc* before the Fifth Circuit was denied on October 29, 1991. Thereafter, on May 22, 1992 the Fifth Circuit affirmed the District Court decision. BN once more filed a suggestion for rehearing *en banc*, which again was denied by the Fifth Circuit on July 9, 1992. BN filed its petition for Writ of Certiorari on October 7, 1992.

B. Statement of Facts

1. *Petitioner's Misstatement of the Facts Established in the record*

The facts found by the District Court in granting the permanent strike injunction bore only on the question of whether the dispute was "minor" or "major", based on whether BN had asserted an arguable contract justification for its action in the face of BMWE's position that BN had made a unilateral contract change. *See Consolidated Rail Corp. v. R. L. E. A.*, 491 U.S. 299 (1989). The District Court made no findings regarding the facts or circumstances relating to the strike itself or the effects thereof. Indeed, the District Court excluded such evidence during the preliminary injunction hearing, which was the only evidentiary hearing conducted below. In addition, the lower court decisions from which this writ has been taken originate from the District Court's Rule 12(b)(6) dismissal of BN's claim for monetary relief

and, thus, the only record facts relevant to the question presented for review are those contained in Petitioner's unamended "Verified Complaint for Injunctive Relief". Thus, the bulk of the facts recited by Petitioner (*See* Petition at 7-8; 24 Fn. 6; 25 Fn. 7, 26) concerning what occurred during the strike and even whether BN actually suffered any of the damages which it now seeks to recover, are simply beyond the pleadings and the facts established in the record.

BN's factual statement is not only an embellishment upon its pleading, but also contains, in BMWE's view, misstatements of the facts and circumstances which actually led up to and occurred during and after the strike with regard to BMWE's motivation for engaging in self-help over this dispute. As discussed in the factual statement to follow, BMWE reasonably believed that the strike action it was taking was lawful. Moreover, in the broader sense, BN's factual implication that the lack of a damage remedy here will leave labor organizations undeterred from engaging in illegal self-help and the carriers with no remedy [4] is totally without foundation in this record (*See* Petition, at 10, 25-26).

So that BMWE is not deemed to have waived its objection to such misstatements of the factual record, BMWE submits this counter-statement of the case. The Court is advised, however, that the following recitation of facts, just as the recitation contained in the Petition, goes beyond the facts pled in Petitioner's complaint or which are the subject of specific findings of the Courts below. The only purpose for providing this counter-statement of facts is to protect BMWE from the Court's assumption that the factual statement presented by Petitioner is as established in the record.

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[4] Thirty-five years ago the Court in *Brotherhood of R. R. Trainmen v. Chicago River*, 353 U.S. 30 (1957) held that the appropriate remedy was a strike injunction.

2. *Counter-statement of the Facts*

BMWE is a labor organization which serves as the collective bargaining representative of employees of BN who work within the maintenance of way craft and class. (R.519).[5] Subordinate to the Grand Lodge of BMWE are System Federations, which are intermediate labor organizations generally organized along carrier lines. (R.520-21). The principal officer of each System Federation is its General Chairman.[6] Since the present day BN is the product of the merger of several formerly independent railroads, there are presently four System Federations of BMWE on BN, each of which is a party to and administers several collective bargaining agreements between those Federations and BN. (R.521-22)

One of the agreements to which each BMWE System Federation on BN is a party is the "Schedule Agreement" which generally governs the hours of service, rates of pay, and working conditions of the employees working within the BMWE craft and class. (R.522). In addition to the Schedule Agreements, however, BN and certain of the BMWE System Federations are also parties to various side or special agreements which supersede the terms of the Schedule Agreement in connection with the specific matters they were negotiated to cover. One such special agreement between BN and three of the four BMWE System Federations is the September 16, 1987 P-811 special agreement. (R.523) The P-811 Agreement specified the terms under which BMWE members would be employed with reference to BN's installation of concrete ties utilizing the P811-S machine. BMWE's position is that the P-811 special agreement superseded the Schedule Agreement and preserved certain jobs from

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[5] The maintenance of way craft and class consists of the employees who construct and maintain the track, buildings and bridges on the right of way along BN's rail lines. (R.520).

[6] Individual defendants Ben Ochoa, E.R. Spears, Paul Swanson and Bruce Glover were respectively the General Chairmen of the four System Federations of BMWE on BN at times relevant to this case. (R.521-22).

further subcontracting on BN's P-811 concrete tie installation program.[7] In BMWE's view, Paragraph "E" of the P811-S Agreement preserved these jobs by providing that BN personnel represented by BMWE would be "bulletined" for all work ahead of and behind the P-811 track-laying machine, including the installation of the "clips" and "insulators" holding the concrete tie to the rail. (Exhibits 3 at R.716; R.529, 533, ff.).[8]

For the first two and a half years after execution of the P-811 Agreement, BMWE members bid on and were assigned all the jobs involving the installation of clips and insulators as required by the P811-S Agreement. (R.534). In March of 1990, however, BMWE received a letter advising that BN intended to make what BMWE believed would be a unilateral change in the P-811 agreement by subcontracting the clipping function to third party contractors. (Exhibit 19 at R.795; R.535). In BMWE's view, this would not only deprive BMWE members of jobs, but would also result in a unilateral change in the P811-S Agreement because it would deny BMWE the very consideration it received for entry into the P-811 agreement, *i.e.*, the preservation of clipping jobs from future subcontracting. (R.538-40). The preservation of these jobs was the *quid pro quo* for BMWE's agreement that certain other work involving the P-811 machine could be subcontracted and for BMWE's agreement to grant BN certain work rule concessions in the P-811 Agreement.

In BMWE's view, if BN stopped issuing bulletins for these jobs to BMWE members and subcontracted the

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[7] The consideration received by BMWE for entry into the P-811 agreement was the promise that certain jobs, particularly those involving the clipping function, would be preserved to BMWE members and would not be subject to subcontracting in the future. (R.530-31, 532-34). In return for that promise, BMWE agreed that certain other work could be subcontracted by BN and granted BN other work rule concessions. (R.530, 532).

[8] A bulletin is the procedure whereby members of BMWE bid on jobs on BN. (R.524-25).

clipping function to a third party, this would be a unilateral change in employee rates of pay, rules and working conditions as embodied in the P-811 agreement without complying with the procedures prescribed by Section 6 of the RLA. (R.538-40). That being the case, this would create a "major" dispute because BN would have violated its obligation to maintain the status quo pursuant to Section 2 SEVENTH of the RLA. (*Id.*). BMWE, thus, felt it had the right to exercise self-help, including taking strike action, to protect its members' interests.[9]

At the request of the BMWE General Chairmen, and in an attempt to resolve the matter short of self-help, a meeting was held with BN officials on April 5, 1990 to discuss the matter. (R.536). At that meeting, and later by corresondence that same date, the General Chairmen specifically advised BN representatives that they viewed the subcontract, if implemented, as a unilateral change in the P-811 agreement, which would create a "major" dispute between the parties, allowing resort to self-help if not resolved. (*Id.*).

The affected General Chairman conferred with the President of BMWE and sought his verification that the dispute was major. (Exhibit 23 at R.809; R.538-39). After obtaining his concurrence (R.538, 540), the three affected BMWE General Chairmen again wrote to BN on May 2, 1990 advising that BMWE would view the subcontracting of the clipping function on BN's concrete tie installation program, as a major dispute over a unilateral contract change. (R.538, 540-41; Exhibit 24 at R.811). BMWE subsequently received a letter dated May 11, 1990 from BN disputing BMWE's position. (R.541). Since it appeared BN was intent upon proceeding to implement this change, BMWE believed the only recourse available to it to protect the interests of its members was to engage in self-help in the event the carrier brought the clip car on to the property. (R.541).

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[9] *See* cases cited at Footnote 2, *supra*.

On May 18, 1990, the Grand Lodge President verified in writing his earlier decision that this was a major dispute over a unilateral change in an existing agreement. (Exhibit 26 at R.816; R.542). He thus authorized the affected BMWE General chairmen to initiate the steps to obtain strike sanction under the Union's Constitution. (*Id.; see* Exhibit 1 at R.586; Exhibit 28 at R.825).

Before taking strike action, special membership meetings were held at each Local Lodge affected by the dispute as required by Article XX § 17(b) of the BMWE Constitution. (R.542-43). At these meetings the members were orally advised about the nature of the dispute and the basis upon which BMWE believed that this was a "major" dispute over which the membership had the right to strike if they voted to do so. (R.543; Exhibit 29 at R.829); Exhibits 30 at R.853; Exhibit 31 at R.855). At these meetings, the membership voted overwhelmingly to strike over this dispute. (R.843-44; Exhibit 33 at R.859).

Based on the membership's determination to strike over this dispute, on June 25, 1990, in accordance with Article XX § 17(b) of the BMWE Constitution, the Grand Lodge officers authorized the initiation of strike action against BN in response to the unilateral change. (R.544; Exhibit 32 at R.857; Exhibit 34 at R.861). The strike action authorized, however, was specifically limited to last for twenty-four hours, from 6:00 a.m. on June 26, 1990 to conclude at 6:00 a.m. on June 27, 1990, and to cover only the portion of BN's property within the one BMWE System Federation (the former CB&Q lines) upon which BN had implemented the clip car. (R.544; Exhibit 35 at R.864). Contrary to BN's assertion in its Petition, the strike was not system wide and was focused only on the one section of BN's property where the unilateral change had been implemented.

BMWE engaged in strike action based on its belief that it could lawfully exercise self-help in response to BN's violation of its status quo obligation under Section 2

SEVENTH of the RLA by making a unilateral change in the P-811 agreement. (R.545-46).

Immediately upon notice of entry of the TRO, BMWE ceased all self-help and other strike activity, and has fully complied with that and all subsequent injunctive orders issued by the District Court. (R.546; Exhibit 37 at R.871).

REASONS FOR DENYING THE WRIT

THE QUESTION PRESENTED DOES NOT MEET THE CRITERIA SPECIFIED IN SUPREME COURT RULE 10 MERITING THE GRANT OF CERTIORARI

As relevant to the question presented here, Supreme Court Rule 10 specifies that the writ should be granted only if (1) there is a conflict among the Circuit Courts; (2) the case below conflicts with a decision of this Court; or (3) this case presents an important unsettled question of federal law which this Court should resolve. Supreme Court Rule 10.1(a) and (c). Since none of the criteria apply here, there is no basis for granting the writ.

I. THERE EXISTS NO CONFLICT AMONG THE CIRCUIT COURTS

Far from there being a conflict among the Circuit Courts, the question presented seeks reversal of the Fifth Circuit's decision in *BN v. BMWE*,[10] which comports with sixty-six years of settled *jurisprudence* under the RLA. This decision followed over 30 years of precedent in the Fifth Circuit[11] and is in accord with the result in a

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[10] *BN v. BMWE, supra*, 961 F.2d 86.

[11] *Louisville & Nashville Railroad Company v. Brown*, 252 F.2d 149, 155 (5th Cir.), *cert. denied*, 356 U.S. 949 (1958); *National Airlines v. ALPA*, 431 F. Supp. 53 (S.D. Fla. 1976).

recent decision by the Sixth Circuit.[12] The decision is also in accord with the reasoning of the Ninth Circuit,[13] in a related context arising under § 2 First. In sum, there are no conflicting decisions and all the Circuit Courts are in accord regarding the appropriate remedies for violations of Section 2 First. There is, thus, no basis for the grant of *certiorari* under Supreme Court Rule 10.1(a).

One year following the Supreme Court's decision in *Brotherhood of R.R. Trainmen v. Chicago River*, 353 U.S. 30 (1957), the Fifth Circuit held in *Louisville & N.R.R. Co. v. Brown*, 252 F.2d 149, 155 (5th Cir.) *cert. denied*, 356 U.S. 949 (1958) that monetary damages were not recoverable by a carrier for a strike which could also be enjoined under *Chicago River* as being over a minor dispute and in violation of § 2 First of the RLA. In the 34 years since, there have been no cases holding contrary to the decision in *Brown*. In fact, the current viability of this holding has been twice reaffirmed in the last year by the only two other Appellate Court decisions, which have considered the issue. *BN v. BMWE*, 961 F.2d 86 (5th Cir. 1982) (the decision below); *CSX v. Marquar*, No. 91-5689, slip op., —— F.2d —— (6th Cir. November 13, 1992).

In considering the present viability of its previous *Brown* decision, the Fifth Circuit in *BN v. BMWE*, the case below, noted that in the years following *Brown* "other courts have recognized *Brown* as holding that there is no cause of action against a union for damages for a breach of the § 152 First duty." *Id.* at 88 (*See* cases cited at Fn. 7 in Court's Opinion). The court below also noted that not only has the Fifth Circuit's decision in *Brown* been followed by other courts, but that in the years since, "there are *no* reported cases awarding damages for the breach of the § 152 First duty." *BN v.*

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[12] *C.S.X. Transportation, Inc. v. Marquar et al.*, No. 91-5689, slip op., —— F.2d —— (6th Cir. November 13, 1992).

[13] *AFA v. Horizon Air*, 976 F.2d 541, 551 (9th Cir. 1992).

BMWE, *supra*, 961 F.2d at 89 fn. 15. Similarly, with respect to BN's claim under § 153 First, the Fifth Circuit below stated that "We are also not aware of any case in which damages have been awarded for violation of § 153 First (i)." *Id.* at 89. In refusing BN's alternative argument to overrule *Brown*,[14] the Fifth Circuit went on to state that "BN has not directed the attention of this Court to any Supreme Court decision holding that monetary relief is available for the breach of the 152 First duty." *Id.* at 89. Accordingly, the Fifth Circuit's decision represents an acknowledgement that this is a well-settled area of federal labor law, where no court has rendered a contrary decision over the sixty-six years of *jurisprudence* under the RLA, nor has any court held differently than the rule as established over thirty-four years ago in the *Brown decision.*

In reaching the same conclusion the Sixth Circuit in *CSX v. Marquar*, No. 91-5689, slip op. at 45 (6th Cir. November 13, 1992)[15] noted that since *Brown*, "No published opinion has ever held that a carrier may recover damages against a union for an illegal strike over a minor dispute." More generally, the Sixth Circuit also noted that:

> In the sixty-six year history of the RLA, no Federal Court has published an opinion holding that a union may recover damages from a railroad, or that a railroad may recover damages from a union. On rare occasions, *individual employees* have been allowed to recover damages from their unions or their carriers,

[14] Petitioner has *twice* sought *en banc* hearing of this case in the Fifth Circuit to consider over-ruling *Brown*, once for initial hearing of the appeal and later for review of the panel decision. On both occasions, not one of the active Judges on the Fifth Circuit considered this case of such significance to even request that the Court be polled on whether to hear the case *en banc*. *See* Appendix C to Petition.

[15] Citation to the decision in *CSX v. Marquar*, *supra*, will to be to the opinion of Ralph B. Guy, Circuit Judge, with whom Judge Jones concurred, who delivered the opinion of the Court holding that it would be inappropriate for the Federal Courts to imply a strike damage remedy against a union under the RLA.

> *but the Courts have not permitted the railroads and unions to use the club of damages against each other.* [emphasis added]

CSX, *supra*, No. 91-5689, slip op. at 43. Although acknowledging that the Fifth Circuit's decision in *Brown* was not binding on it, the Sixth Circuit in *CSX* concluded that "Since at least 1958, the RLA 'common law' has been that a railroad may not recover damages for a strike over a minor dispute." *CSX*, *supra*, slip op. at 46.[16] The *CSX* court found further that no demonstration had been made that the injunctive remedies which have been deemed appropriate for sixty-six years are no longer sufficient, and that there were strong policy reasons grounded in the RLA, which would make the imposition of a damage remedy in these circumstances inappropriate.[17] Accordingly, the Sixth Circuit in *CSX* reached the same result as the Fifth Circuit in *Brown* and *BN v. BMWE* and concluded that "the common law that has emerged [under the RLA] does not contemplate awards of damages between unions and railroads." *Id.* slip op. at 43.

Brown and *BN v. BMWE* in the Fifth Circuit, and *CSX* in the Sixth Circuit, are the only federal appellate cases to directly address the issue presented. While both Circuits use a somewhat different approach to arrive at the same conclusion, they both clearly hold that monetary

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[16] The 6th Circuit stated:

> Congress envisioned that the courts would set up a body of law to enforce the RLA. The resulting body of the law has not permitted railroads and unions to recover damages against each other generally and, particularly, in the situation presented in this case. After 66 years, a Court should be reluctant to change the balance that has been struck between railroads and unions.

CSX, *supra*, No. 91-5689, slip op. at 46.

[17] Citing this Court's previous decision in *IBW v. Foust*, 442 U.S. 42, 47 (1979) the *CSX* court stated that "damages awards between railroads and unions are inappropriate because they threaten the delicate balance intended by the RLA." *CSX*, *supra*, No. 91-5689 slip op. at 44.

damages are not recoverable by a carrier against a union which engages in a strike in violation of § 2 First.

While the only cases directly on point are in the Fifth and Sixth Circuits, by analogy, denying a damages remedy as being inappropriate is also supported by the reasoning of a recent decision of the Ninth Circuit. *AFA v. Horizon Air*, 976 F.2d 541, 551 (9th Cir. 1992). In that case a union was denied monetary relief in the form of attorneys' fees (apparently damages were not sought) against a carrier who had violated § 2 First by negotiating without the intent of ever reaching an agreement. In that case, fees were sought against the carrier on the same basis that damages are being sought against the union in this case, *i.e.* that this Court's decision in *Chicago and Northwestern Railway v. UTU*, 402 U.S. 570, 577 (1971) allows the Courts to fashion remedies for violations of the RLA "by whatever appropriate means might be developed on a case by case basis." In its decision, the Ninth Circuit discusses the policy reasons supporting denial of attorneys fees under the RLA, which reasoning would equally apply to the recovery of any other forms of monetary relief, including damages, between unions and carriers under the RLA. Thus, while not directly on point, the Ninth Circuit's decision in *Horizon Air* is certainly consistent with the long line of authority under the RLA, holding that injunctive relief, channeling the parties into the resolution of their disputes under the procedures of the RLA, is the limit of appropriate remedies. The reasoning of that case thus supports the rule that the imposition of monetary remedies, whether they be damages or attorney's fees, as between carriers and unions, are not appropriate under the RLA.

Not only are the only two Circuit Courts to have directly considered this question in accord, but there are no District Court decisions in any other circuits which

have reached a contrary result.[18] In *National Airlines, Inc. v. ALPA*, 431 F. Supp. 53 (S.D. Fla. 1976), which is the only other District Court case to have directly addressed this issue, the District Court noted that in the eighteen years since the *Brown* decision, all the cases involving the judicial enforcement of § 2 First "confined § 2 First remedies to those partaking of the nature of equitable injunctive relief." *Id.*, 431 F.Supp. at 54. Noting the apparent congressional satisfaction with the *Brown* decision, evidenced by the fact that in those 18 years "Congress has [not] enacted legislation which even suggests its intent to create a right of action for damages," and that "the policy considerations underlying the *Brown* decision are as tenable today as when *Brown* was decided," the Court denied a similar damage claim. *Id.* at 55.

Accordingly, not just every Circuit Court decision, but literally every judicial decision to address this issue in the 66 years of RLA *jurisprudence* has consistently held that damages are not recoverable in these circumstances. Thus, there is no conflict which this Court need resolve under Supreme Court Rule 10.1(a).

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY APPLICABLE DECISIONS OF THE SUPREME COURT

This case does not present the Court with the opportunity to reverse a decision which conflicts with decisions of this Court. *See* Supreme Court Rule 10.1(c). No decision of this Court has ever countenanced the resolution of disputes between labor organizations and carriers under the RLA by the imposition of damage awards.

[18] The only reported case where strike damages were ever *awarded* was *Denver & Rio Grande Western Railroad v. Brotherhood of Railroad Trainmen*, 58 L.R.R.M. 2568 (D. Co. 1965) (not officially reported), *rev'd on other grounds*, 367 F.2d 157 (10th Cir. 1966), *rev'd*, 387 U.S. 556 (1967). That case, however, has no precedential value for the reasons stated by the Fifth Circuit in *BN v. BMWE*, *supra*, 961 F.2d at 89 fn 15, and by the Sixth Circuit, in *CSX*, *supra*, No. 91-5689, slip op. at 46 fn 4, in their discussions of that case.

Rather, this Court's decisions under § 2 of the RLA reveal the careful circumscription of the available remedies to an injunction channeling the parties back into compliance with their RLA duties and resolution of their disputes under the workings of the Act. The Supreme Court cases cited by Petitioner are, thus, inapposite.

In its Petition, BN argues that *certiorari* should be granted, because the Fifth Circuit's decision below conflicts with certain Supreme Court decisions. However, when one focuses on the cases cited by BN, it is evident that all the cases cited are inapposite to the issue of the recovery of legal damages under the RLA. Three of the Supreme Court cases relied upon by BN arise under the RLA, but each deals solely with the issue of whether the Courts have authority to issue *injunctive* relief to enforce the duties specified in Section 2 of the RLA. Not one even remotely deals with the issue of whether damages are recoverable.[19]

Of the three Supreme Court RLA injunction cases cited by BN, it principally relies upon *Chicago & N.W.R.W. v. UTU*, 402 U.S. 570 (1971). BN argues that *UTU* supports the implication of a damage remedy based on the

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[19] In each of the cases cited by BN there was no issue of monetary relief and the quotes that BN relies on are solely within the context of the Court's authority to enter injunctive relief. *See Texas and New Orleans Railway Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930) (*injunction* action to enforce § 2 Third of the RLA, which protects the right of the employees and the carrier to designate their representatives without influence or coercion from the other party); *Virginian Railway Co. v. System Federation #40*, 300 U.S. 515 (1937) (*injunction* action to enforce § 2 Ninth of the RLA to require the carrier to meet and treat with the employees' representative as certified by the National Mediation Board); *Chicago and Northwestern Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971) (*injunction* action where issue was whether a strike injunction could be entered to enforce § 2 First, in the face of the prohibitions of the Norris-LaGuardia Act, 29 USC § 101, *et seq.*, after conclusion of the RLA procedures when the union would otherwise be free to exercise self-help, but where it was alleged that the union failed to negotiate properly during those procedures).

Court's statement that Section 2 First was "designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case by case basis." Id. at 577. In that case the Court was struggling with whether, in the unique facts presented there, a strike could be enjoined, despite the strike injunction prohibitions of the Norris Laguardia Act, 29 USC § 101 *et seq.* The context of the quote relied on by BN is not whether damages or monetary relief may be assessed, but what manner of appropriate *injunctive* relief a court could fashion to enforce § 2 First to meet the particular needs of the case at bar. It is simply a misuse of *UTU* to cite it for the proposition that damage awards may be imposed to resolve disputes under the RLA when monetary relief was never even at issue in that case. In fact, a correct reading of *UTU* reveals that it addressed no more than whether an injunction may issue in the face of the Norris Laguardia Act prohibitions when a strike injunction is the "only practical, effective means of enforcing" Section 2 First. *Id.* at 583.[20]

Similarly, BN's reliance on quotations from *Steele v. L. & N.R.R. Co.*, 323 U.S. 192 (1944) is entirely off point. *Steele* was a fair representation case which deals with the relationship between a union and those it represents and not with the relationship between a union and rail carriers established by the RLA.[21] Since a fair representation case is more akin to a breach of fiduciary duty action, *see Teamsters v. Terry*, 494 U.S. 558, 567-568 (1990), it is entirely inapposite to a case involving the relationship between carriers and labor organizations

[20] If BN's reading of *UTU* was correct then the union in *AFA v. Horizon Air, supra*, 976 F.2d at 551 would not only be entitled to attorney's fees, but also to recover as damages its negotiation expenses incurred while the carrier was violating § 2 First by negotiating without the intent to reach an agreement.

[21] As the Court stated in *CSX, supra*, slip op. at 43:

> On rare occasions *individual employees* have been allowed to recover damages from their unions or their carriers, but the Courts have not permitted the railroads and unions to use the club of damages against each other.

under the RLA, which is not a fiduciary relationship, and where policy concerns are at issue involving the maintenance of a balance between the two in addressing the resolution of disputes.

Finally, BN argues that the *Brown* holding is inconsistent with Supreme Court's recent decision in *Franklin v. Gwinnette County Public Schools*, —— U.S. ——, 117 L.Ed.2d 208 (1992). Once again *Franklin* is not a case dealing with the enforcement of the duties under the RLA, but is an action arising under an entirely different line of cases dealing with the availability of damages under Title IX of the Education Amendments of 1972, 20 USC § 1681-1688. As the Fifth Circuit held below, "even if this Court were considering the issue on a clean slate, *Franklin* would not control." *BN v. BMWE*, *supra*, 961 F.2d at 89 fn. 9.[22]

Moreover, *Franklin* requires the presumption of a damages remedy only when such a remedy is "appropriate" and "unless Congress has expressly indicated otherwise." *Franklin*, *supra*, —— U.S. ——, 117 L.Ed.2d at 217. As demonstrated by the Sixth Circuit in *CSX*, such a remedy would not be appropriate here because it would upset the careful balance of interests necessary to achieve the purposes of the RLA. *CSX*, *supra*, No. 91-5689, slip op. at 44, citing *IBEW v. Foust*, *supra*, 442 U.S. at 48-50-51; *see also* discussion at section III.B. *infra*, in this brief.

Moreover, there is strong indication that Congress has "indicated otherwise," which also supports the conclusion that a damage remedy is also inappropriate. And therefore, *Franklin* does not mandate implication of a damage remedy. As recognized by the Sixth Circuit in *CSX*, this Circuit's *Brown* holding has now become well entrenched as part of the federal common law under the RLA. *CSX*, *supra*, No. 91-5689, slip op. at 46-47. The failure of Congress to legislatively reverse *Brown* in the 34 years since should be taken as indication that Congress did not intend

[22] *See* discussion at III A *infra* and footnote 25 *infra*.

a damage remedy in these circumstances and as an expression of Congressional policy on this issue. As this Court stated in another context, "at this advanced stage of the RLA's development. . . it is for Congress, and not the courts, to strike the balance between the uncontrolled power of management and labor to further their respective interests." *Burlington Northern v. BMWE*, 481 U.S. 429, 452-53 (1987). Thus, even assuming, without conceding, that *Franklin* would apply to an RLA case, *Franklin* does not require the implication of a damage remedy, because Congress has "indicated otherwise" as evidenced by (1) its refusal to extend to cases under the RLA the damage action it created for cases arising under the National Labor Relations Act ("NLRA"), and (2) its expression of satisfaction with the *Brown* rule by allowing it to become well embedded in the RLA common law by refusing to legislatively overturn it in thirty-four years.

In sum, as stated by the Fifth Circuit in the decision below, "BN has not directed the attention of this Court to any Supreme Court decision holding that monetary relief is available for a breach of the § 152 First duty." *BN v. BMWE*, *supra*, 961 F.2d at 89. Since the decision below is not inconsistent with an previous decision of the Supreme Court, there is no reason to grant *certiorari* on that basis under Supreme Court Rule 10.1(c).

III. THE DECISION BELOW PRESENTS AN ISSUE THAT HAS BEEN LONG SETTLED AND IS, THUS, NOT AN IMPORTANT QUESTION OF FEDERAL LAW REQUIRING SUPREME COURT RESOLUTION

This case does not present a question involving an important issue of federal law which has not been, but should be, resolved by this Court, which would justify granting the writ under Supreme Court Rule 10.1(c). As aptly stated by the Sixth Circuit "the Courts have not permitted the railroads and the unions to use the club of damages against each other." *CSX*, *supra*, No. 91-5689, slip op. at 43.

Thus, the reasons underlying the holding of both the Fifth and Sixth Circuit [23] are based upon the recognition that it would be inappropriate for the Courts to imply a damage remedy, or a damage cause of action, under the RLA, because to do so would (1) be destructive of the RLA's procedures and frustrate the achievement of its stated policy objectives; and (2) involve the courts "at this advanced stage of the RLA's development" [24] in a matter which should be properly left for Congress to consider in carrying out its legislative function of establishing labor policy. Viewed in this sense, the holdings in both the Fifth and Sixth Circuits are based on identical propositions; i.e. it would be "inappropriate" for the Courts to fashion a damage remedy in these circumstances. Moreover, arming the courts with the power to impose legal damages, would transform judicial enforcement of the RLA from the limited exercise of equity jurisdiction, requiring the parties by injunction to comply with their RLA duties, into a court at law resolving disputes between the parties through the imposition of damage awards. Such a fundamental change in the workings of the RLA should be left to Congress.

A. The Courts Have Consistently Held That Creation of a Strike Damage Remedy Under the RLA Is a Matter for Congress and Not the Courts

The fact that Congress has declined to legislatively reverse the *Brown* holding during the thirty-four years which have elapsed since its decision is compelling evidence that Congress is satisfied with the state of the common law under the RLA with respect to the extent of available remedies for enforcement of § 2 First. Thus, one may reasonably conclude that by allowing *Brown* to

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[23] These policy reasons also underlie the decision of the Ninth Circuit in *AFA v. Horizon Air*, *supra*, 976 F.2d at 551 (9th Circuit 1992) denying a union monetary relief in the form of attorneys fees for a carrier's violation of § 2 First, even in the face of the argument that the Court could imply such a remedy under *Chicago & North Western*, *supra*, 402 U.S. at 577.

[24] *Burlington Northern R.R. v. BMWE*, 481 U.S. 429, 452 (1987).

stand as the law, Congress is indicating that damages should not be available in these circumstances.

Thus, even assuming that this Court's decision in *Franklin v. Gwinnette County*, —— U.S. ——, 117 L.Ed.2d 208 (1992), applies to RLA cases, *Gwinnette's* presumption of the availability of "all appropriate" remedies "unless Congress has expressly indicated otherwise", *Gwinnette, supra*, 117 L.Ed.2d at 217, would not require the implication of a damage remedy here, since the holdings of the Fifth and Sixth Circuits stand for the proposition that a damage remedy is both not "appropriate" in these circumstances, and the acquiscence of Congress by allowing *Brown* to remain the law for over thirty-four years indicates that Congress does not want remedies under the RLA extended to damages, at least in this particular circumstance.

Indeed, the *Brown* Court, being sensitive to its role as an interpreter and not a maker of law and seeking to avoid usurping the function of Congress to establish labor policy, noted that "where Congress sought to set up a right of acton for damages for breach of duty in other *labor management* situations, it enacted a statute expressly spelling out the nature of the right of action." [emphasis added]. *Brown, supra*, 252 F.2d at 155. The *Brown* Court then cited to § 303 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 187, which specifically created a cause of action for damages for a strike in violation of § 8(b)(4) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(b)(4). Since damages for strikes in violation of the NLRA are not recoverable, in the absence of Congressional enactment of § 303, no cause of action for damages would exist. Similarly, when Congress decided to authorize the recovery of damages for a strike in violation of a collective bargaining agreement, enabling legislation was enacted specifically creating a right of action for damages. *See* § 301 at the LMRA, 29 U.S.C. § 185; *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979). Thus, although having the opportunity during the passage of the LMRA to extend the remedy for strike damages to cases under the

RLA, Congress specifically declined to do so. Considering that the labor statute which specifically authorizes a damage remedy for illegal strikes also specifically excludes RLA carriers from its scope, *See* 29 U.S.C. § 182, there is clear indication that Congress did not intend to extend such damage claims to cases under the RLA.[25]

The continued refusal of Congress since the passage of the LMRA to legislatively overrule *Brown*, establishes *Brown* as both an element of the common law of the remedies available for judicial enforcement of § 2 First, but also as an indication that *Brown* comports with Congressional policy regarding the remedies which should be available, and not available, for the judicial enforcement of the RLA. After more than thirty years of limiting enforcement of the RLA, as between carriers and unions, to injunctive relief, it would be a usurpation of the function of Congress to establish labor policy for the *Brown* holding to be reversed at this late date. Indeed, to imply a damage remedy in these circumstances would be tantamount to judicial enactment of § 303 of the LMRA into the RLA.

Even without respect to whether the legal basis for the *Brown* Court holding remains sound (which BMWE submits it is), over the passage of years this holding has embedded itself in the common law developed by the courts in the interpretation of the RLA. As the District Court noted in *National Airlines*, Congress must have been satisfied with the state of this common law since in the twenty years since the *Brown* decision "Congress [has not] enacted legislation which even suggests its intent to create a right of action for damages." *National Airlines*, *supra*, 431 F. Supp. at 54.

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[25] In *Gwinnette*, this Court presumed that Congress legislated with full knowledge of the Court's prior decisions. Thus in leaving judicially crafted remedies undisturbed, the Court concluded that Congress did not intend to modify the available remedies. Likewise Congress' satisfaction with *Brown*, and its progeny, manifest approval of the now "traditional rule" regarding the lack of a damage remedy between carriers and unions under the RLA.

Similarly, the Sixth Circuit in *CSX*, *supra*, No. 91-5689, slip op., 46-47 is in accord. In *CSX* the Sixth Circuit held that since the limitation against the recovery of strike damages has become part of the common law under the RLA, it should be up to Congress and not the courts to create a damage remedy. *Id.* at 47. In *CSX* the court notes that in *Burlington Northern v. BMWE*, 481 U.S. 429 (1987), the Court was faced with the question of whether the RLA implicitly bars secondary picketing. Although there is no prohibition in the RLA against secondary activity similar to that found in the National Labor Relations Act ("NLRA"), 29 USC § 158(b)(4), the Court refused to imply a similar bar under the RLA. In language applicable here, which is quoted by the Sixth Circuit in *CSX*, the Supreme Court stated:

> We decline, *at this advanced stage of the RLA's development*, to find in it an implied limit on a union's resort to secondary activity. Instead, "if Congress should now find that the abuses in the nature of secondary activities have arisen in the railroad industry . . . *it is for Congress, and not the Courts, to strike the balance 'between the uncontrolled power of management and labor to further their respective interests.'*"

Burlington Northern, *supra*, 481 U.S. at 252-53 (citation omitted) [emphasis added]. Thus, the Sixth Circuit in *CSX* came to the same conclusion as the Fifth Circuit in *Brown* that if present circumstances in the railroad and airline industry merit the imposition of a damage award, the "argument properly should be made to Congress." *CSX Transportation*, *supra*, No. 91-5689, slip op. at 47.

B. The Courts Have Consistently Held That Creation of a Strike Damage Remedy Under the RLA Is Inappropriate Because It Would Be Destructive of the Proper Functioning of the RLA

The Fifth and Sixth Circuit holding that the recovery of strike damages is not an appropriate remedy is ultimately based upon the recognition that a damage remedy

would be destructive of fundamental policy considerations underlying the RLA and would undermine the balance it created between the interests of employees and the carriers. It is these policy considerations which have prompted Congress to decline to legislatively reverse *Brown* over the last three decades. Moreover, BN has shown no reason for judicially deviating from the rule by demonstrating that the remedies appropriate for sixty-six years are no longer sufficient.

1. *The Courts recognize that after sixty-six years the implication of a damage remedy which could undermine RLA policy objectives requires a showing that injunctive remedies are no longer sufficient*

Noting that "the Courts have not permitted the railroads and unions to use the club of damages against each other", *CSX*, *supra*, No. 91-5689, slip op. at 43, the Sixth Circuit concluded in *CSX* that "damages awards between railroads and unions are inappropriate because they threaten the delicate balance intended by the RLA." *Id.* at 44. In reaching that conclusion the *CSX* Court cited to this Court's decision in *IBEW v. Foust*, 442 U.S. 42, 47 (1979), which counseleld that "a court's task in enforcing the RLA 'is to implement a remedial scheme that will best effectuate the purposes of the Railway Labor Act, recognizing that the overarching legislative goal is to facilitate collective bargaining and to achieve industrial peace.' " *CSX*, *supra*, slip op. at 44, quoting, *Foust*, *supra*, 442 U.S. at 47. Accordingly, just as this Court concluded in *Foust* that punitive damages were not recoverable against a union in a duty of fair representation case, the Sixth Circuit concluded that a strike damage award against a union in an RLA case is likewise inappropriate, because it could also "impair a union's financial stability and thereby upset the careful balance of interests necessary to achieve the purposes of the RLA." *CSX*, *supra*, slip op. at 44.

Similarly, the Fifth Circuit's decision in *Brown*, and thus its decision in *BN v. BMWE* below, is grounded on the identical policy concerns expressed by this Court in *Foust*, i.e. a damages remedy could impair the labor management relationship intended by the RLA. Recognizing that this was the same policy basis underlying the *Brown* holding, the District Court in *National Airlines* stated:

> . . . [T]he Court is of the opinion that *policy considerations underlying the Brown decision are as tenable today as when Brown was decided.* The life cycle of labor-management bargaining is heated and oftentimes results in bitter accusations. Representatives attempt to secure the best possible terms for their respective sides. To create a right of action in favor of an employer against a union and its collective bargaining representatives for losses the former incurs in the course of the collective bargaining process would, in effect, give the employer a weapon with which to keep the unions and their agents "in line." Surely, neither Congress nor the Appellate Courts would fashion a remedy which would give the employer a lever upon which to gain such an unfair advantage. [Emphasis added].

National Airlines, supra, 431 F.Supp. at 54.

In the years since *Chicago River* held that a strike over a minor dispute could be enjoined, the Courts have exercised judicial restraint, showing sensitivity to these policy concerns (which are also expressed by Congress in the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*) and, therefore, have limited the exercise of their equitable powers in granting strike injunctions to the extent necessary to fulfill the RLA's purposes. Nevertheless, like the Plaintiff in *National Airlines*, BN remains "[u]nsatisfied with the injunctive relief and favorable results therefrom" and argues that complete relief and fulfillment of the RLA's purposes requires the imposition of damages. However, complete relief aimed at serving the RLA's goals requires only the restoration of labor peace through a strike injunction and does not require the shifting of

the incidental costs of the employees' protected activity to the employees themselves. As noted in *National Airlines*, imposing this burden on the employees would simply cater to the "unmitigated desire for vengeance" of the carrier and would not serve the purposes of the RLA. *National Airlines*, *supra*, 431 F.Supp. at 54.

As the Sixth Circuit remarked in *CSX*, the body of common law that has developed with respect to the enforcement of the RLA "has not permitted railroads and unions to recover damages against each other generally, and, particularly, in the situation presented in this case." *CSX*, *supra*, No. 91-5689 at 46.

The Sixth Circuit goes on to state that "after 66 years, a court should be reluctant to change the balance that has been struck [by the RLA] between railroads and unions," and that "at a minimum" before making such a change, there should be a "demonstrat[ion] why the remedies that have been appropriate for 66 years are no longer good enough." *CSX*, *supra*, No. 91-5689, slip op. at 46.

2. ***Petitioner has made no showing that injunctive relief is no longer sufficient and its argument is premised on the false legal conclusion that there is "an illogical asymmetry" in the remedies available under the RLA and the false factual assumption that there is a need for deterrent measures***

BN argues that injunctive remedies are no longer sufficient and that a change should now be made after 66 years to imply a damage remedy based on two false legal and factual assumptions. First BN falsely asserts that an "illogical asymmetry" exists under present law whereby "unions may be awarded the full range of relief, including damages, for a carrier's violation of its duties under the RLA, but carriers are not allowed this full range of remedies when a union violates its duties under the RLA." (*See* Petition pp. 4, 10-11, 23-25). Second, BN makes the false factual assertion that there

is a basis in this record for finding that, despite the availability of a strike injunction,[26] labor organizations are undeterred from engaging in illegal self-help without the threat of a damage remedy. (See Petition pp. 10, 25-26).

As to the first point, it is simply a misstatement of the law to say that unions may recover damages against carriers under the RLA, but that carriers may not do the same. BN's false assertion that an "illogical asymmetry" exists can be summarily dismissed by the Sixth Circuit's statement in *CSX* where, after examining all of the relevant cases under the RLA, the court stated:

> In the 66-year history of the RLA, no *federal court has published an opinion holding that a union may recover damages from a railroad* or that a railroad may recover damages from a union. [Emphasis added]

CSX, supra, No. 91-5689, slip op. at 43.[27]

As to BN's second basis for granting *certiorari*, i.e., the alleged need for a deterrent to illegal strikes, the Sixth Circuit in *CSX* disposes of this point by stating that "we have no reason to believe that the need for damages to deter illegal strikes over minor disputes is any greater today than it was when *Brown* was decided in 1958, or when the RLA was enacted in 1926." *CSX, supra*, No.

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[26] See *Brotherhood of Railroad Trainmen v. Chicago River*, 353 U.S. 30 (1957).

[27] Apparently BN seeks to support its misstatement of the law in this regard by reference to the Fifth Circuit's decision in *United Industrial Workers of the Seafarers Int'l Union v. Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968) *cert. den.* 395 U.S. 905 (1969). (*See* Petition pp. 23-25). However, as noted by the Sixth Circuit in *CSX, supra*, No. 91-5689 slip op. at 43, fn 3, and by the Fifth Circuit in the case below, *Burlington Northern v. BMWE, supra*, 961 F.2d at 88-89, *Galveston Wharves* is not relevant to this issue, since it did not deal with the issue of the recovery of compensatory damages between carriers and unions, but rather with the entitlement to recover the *equitable* remedy of back pay by *individual employees*.

91-5689, slip op. at 46. Similarly, the factual record below, which concerned only whether BMWE had the right to strike based on the District Court's determination of whether the dispute was minor or major, is likewise devoid of any basis for BN's assertion that the lack of a damage remedy has left labor organizations, in general, undeterred from illegal strikes which after sixty-six years is suddenly a problem requiring remediation. Indeed these factual assertions are both unestablished and untrue.[28]

Finally, even assuming BN's unestablished factual allegations regarding the need for deterrent measures were true, for the reasons stated by the Sixth Circuit in *CSX*, *supra*, No. 91-5689, slip op. at 47, BN's argument should properly be addressed to Congress, and not the courts.

3. *The Courts and commentators recognize that a damage remedy here would be inappropriate, because it would be destructive of the RLA dispute resolution procedures and undermine its policy objectives*

Quite apart from whether there exists any basis for Congress to consider creating a damage remedy, all the courts and commentators on the RLA that have considered this issue, have concluded that to imply a damage remedy in this context in fact would be destructive of the Act's procedures, and frustrate its ultimate policy objectives.[29] In language equally applicable to this case, the Sixth Circuit in *CSX* stated:

> By contrast, the concerns that weigh against such a remedy are as present today as they ever were. In the volatile atmosphere of labor-management rela-

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[28] See discussion at "B. Statement of Facts, 1. Petitioner's Misstatement of the Facts as Established in the Record," *supra*, pp. 4-5.

[29] *See also*, the discussion of the Ninth Circuit in *Horizon Air*, *supra*, 979 F.2d at 551 regarding the similar policy reasons which make inappropriate a monetary award of fees to a union for a carrier's violation of Section 2 First.

> tions, the threat of a damages action could upset the balance intended by the RLA.
>
> The problem is particularly acute in a case such as this where the union cannot know with certainty at the time it calls a strike whether a court will later decide that the dispute is minor or major. If damages were available, and the union guessed wrong, it would be liable for damages that could deplete the union treasury and impair its effectiveness as the collective bargaining agent. *Cf. Foust*, 442 U.S. at 50-51. This threat of crushing financial loss allows the carrier to keep the union "in line" and the employees off the picket line even in cases where the dispute is later adjudged to be major. See *National Airlines*, 431 F. Supp. at 54.

CSX, supra, No. 91-5689, slip op. at 46-47.

Contrary to BN's factual assertions, which are unsupported by the record or any findings of the courts below, BMWE reasonably believed that this was a major dispute over which it had a right to strike. At that time, BMWE did not have the benefit of a court at its elbow to evaluate and rule upon the propriety of its conclusion that the dispute was major. As the court held in *CSX*, if damages were available, a union would risk, in the exercise of lawful self help, exposure to damages which could bankrupt it, making it incapable of carrying out its statutory duty of representing the employees under the RLA. This would have a chilling effect on the exercise of self-help in those circumstances when it has been deemed lawful and necessary for the proper functioning of the RLA over the past sixty-six years. *See Shoreline, supra*, 396 U.S. at 154-55.

These policy concerns have also been recognized by commentators on the RLA. In his *Principles of Railroad and Airline Labor Law*, which was cited with approval by the Fifth Circuit in the case below, *BN v. BMWE*, *supra*, 961 F.2d at 89 fn. 15, Harry Lustgarten, after noting that no case had ever allowed the recovery of such damages, stated:

> It appears unlikely, moreover, that the courts in the future would be inclined to allow such damages in view of the potential impact it might have on the union's ability to represent the employees.[30]

Accordingly, the Fifth and Sixth Circuit decisions holding a damage remedy inappropriate in these circumstances are based on sound policy reasons underlying the RLA and which have become well-settled elements of the RLA common law for over three decades. Thus, this case does not present a circumstance where writ of *certiorari* should be granted under Supreme Court Rule 10.1(c) to resolve an important unsettled issue of federal law.

CONCLUSION

For these reasons, the petition for writ of *certiorari* should be denied.

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[30] Harry Lustgarten, *Principles of Railroad and Airline Labor Law*, RALL Publications, p. 157 (1984). Elaborating on the compelling policy reasons against the creation of a damage remedy under the RLA in these circumstances, Lustgarten states:

> The very size of the potential damages arising from an unlawful strike tends to mitigate against allowing a carrier to recover them from a union. Even for the relatively short period required to obtain an injunction, the damages suffered by a rail carrier would in most cases exceed the financial ability of the union to pay. To allow a carrier to recover such damages, therefore, could threaten the solvency and perhaps the very continued existence of the union. Since it is clearly the policy of the Act to encourage and protect the right of a union to represent the employees, from a public policy standpoint there is little to justify an interpretation of the Act which would permit a carrier, not only to promptly stop an unlawful strike through injunctive action, but to also recover damages in an amount which could threaten the ability of the union to continue to represent the employees.

Id. at 157.

Respectfully submitted,

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APPENDIX

Sections 2 First, Sixth, and Seventh of the Railway Labor Act, 45 U.S.C. § 152 provide as follows:

> First. Duty of carriers and employees to settle disputes
>
> It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any other carrier growing out of any dispute between the carrier and the employees thereof.
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> . . . .
>
> Sixth. Conference of representatives; time; place; private agreements
>
> In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.